

Thomas Jefferson to Wilson Cary Nicholas, January 26, 1802, from The Works of Thomas Jefferson in Twelve Volumes. Federal Edition. Collected and Edited by Paul Leicester Ford.

TO WILSON CARY NICHOLAS J. MSS.

Washington Jan. 26, 1802.

Dear Sir, —The enclosed paper was put into my hands by Mr. Madison to fill up some dates, but I have been so engaged as to do little to it; and supposing you will want it to-day I send it as it is. To that list may be added the appointment of Gouv. Morris to negotiate with the court of London, by letter written and signed by Genl. Washington, and Dav. Humphreys to negotiate with Liston by letter. Commissions were not given in form because no ministers had yet been sent here by those courts. But all the powers were given them, and half the salary (as they were not to display the diplomatic ranks, half salary was thought sufficient) but they were compleatly officers on salaries, and no notice given the senate till afterwards.

The phrase in the constitution is: “to fill up all vacancies that may happen during the recess of the Senate.” This may mean “vacancies that may happen to be” or “may happen to fall” it is certainly susceptible of both constructions, and we took the practice of our predecessors as the commentary established. This was done without deliberation; and we have not before taken an exact view of the precedents. They more than cover our cases, but I think some of them are not justifiable. We propose to take the subject into consideration, and to fix on such a rule of conduct, within the words of the constitution, as may save the government from serious injury, and yet restrain the executive within limits which might admit mischief. You will observe the cases of Reade & Putnam, where the

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persons nominated declining to accept the vacancy remained unfilled & had happened before the recess. It will be said these vacancies did not remain unfilled by the intention of the executive, who had, by nomination, endeavored to fill them. So in our cases, they were not unfilled by the intention of the successor, but by the omission of the predecessor. Chas. Lee informed me that wherever an office became vacant so short a time before congress rose, as not to give an opportunity of inquiring for a proper character, they let it lie always till recess. However this discussion is too long for a letter. We must establish a correct and well digested rule of practice, to bind up our successors as well as ourselves. If we find that any of our cases go beyond the limits of such a rule, we must consider what will be the best way of preventing their being considered authoritative examples. In the meantime I think it would be better to give the subject the go for the present, that we may have time to consider and to do what will be best for the general safety. Health & respect.

P. S.—When you are done with the enclosed paper I shall be very glad to receive it again to copy it for publication.